

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 558 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? NO.

2. To be referred to the Reporter or not? NO

3. Whether Their Lordships wish to see the fair copy
of the judgement? NO

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge?
NO.

GANDAJI @ GANDIO MOHANJI

Versus

STATE OF GUJ

Appearance:

MR PM VYAS for Petitioner

MR KP RAVAL,A.P.P. for Respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

Date of decision: 16/09/97

ORAL JUDGEMENT

(Per Panchal, J.)

1. By means of filing this appeal under Section 374
of the Code of Criminal Procedure, 1973, the appellant
has challenged legality and propriety of the judgment and
order dated August 9, 1989, rendered by learned Addl.

Sessions Judge, Mehsana, in Sessions Case No.110 of 1988, by which he is convicted under Sections 8 and 20 (b) (ii) of Narcotic Drugs and Psychotropic Substance Act, 1985, and sentenced to suffer R.I. for 10 years as well as fine of Rs.1,00,000/- (Rupees One Lac), in default, S.I. for 1 year.

2. On March 18, 1988, Mr. S.R.Yadav, who was then discharging duties as Police Sub-Inspector, Kalol, was on patrolling in Kalol town in company of Police Constable Maheshbhai Ganpatbhai, Police Constable Jayantibhai Somabhai and Jamadar Parsottamdas Somdas. When the Police Sub-Inspector together with other police officials, reached Mathuriya cross roads, he received an information that a man who had put on white pant and white shirt and who had black hair was to come with charas from the direction of public water tank. On receipt of the information, the Police Sub-Inspector requisitioned services of two panch witnesses and kept watch near public water tank. After sometime, the Police Inspector and others spotted a person coming from the direction of water tank. When the said person came near the police officials, he was asked to stop, but on seeing police officials, the said man started running towards public water tank. As a result he was chased by police officials and panchas. While running, the said person accidentally fell into a pit which was dug near the water tank and sustained injuries on his hand, leg and back. A search was made of the said person in the presence of panch witnesses which resulted into find of a plastic bag wherein there was a black substance. The said substance was taken out from plastic bag and it smelt like charas. Thereafter, the Police Sub-Inspector asked Police Jamadar Jayantibhai to bring the weighing scales from Kalol Police Station. Accordingly weighing scales were brought and on substance being weighed, it was found that the weight of the substance was 10 grams. The name of the person who was searched was Gandaji alias Gadio Mohanji i.e. the appellant. The appellant had no pass or permit authorizing him to possess charas. Therefore, charas was seized in presence of panch witnesses. The substance was thereafter, placed into plastic bag wherein two slips bearing signatures of the panch witnesses were also placed. The plastic bag was placed in a cover which was tied by means of twine and seal of the Police Inspector, Kalol Police Station was affixed thereon. P.S.I. Mr. Yadav filed complaint against the appellant for the offences punishable under the provisions of Narcotic Drugs and Psychotropic Substance Act, 1985 ("the Act" for short). The mudamal seized was sent to Forensic Science Laboratory for analysis. On analysis, it was

found that the substance analyzed was charas. On completion of investigation, the appellant was chargesheeted in the Court of learned Judicial Magistrate First Class, Kalol, for the offence punishable under Section 8 of the Act. As the offence punishable under the Act is triable by Court of Sessions, the case was committed to Sessions Court and it was numbered as Sessions Case No.110 of 1988 in the Court of learned Additional Sessions Judge, Mehsana.

3. The learned Judge framed charge against the appellant vide Exh.4. The charge was read over and explained to the appellant who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Ishwarbhai Dahyabhai Raval, PW 1, Exh.7 (2) Bhikhaji Tasaji Thakor, PW 2, Exh. 9 (3) Shivnathsing Rajdevsing Yadav, PW 3, Exh.10, (4) Parsottamdas Somchand, pw 4 Exh.15 (5) Sendhabhai Manjibhai, PW 5, Exh.16 and (5) Bhimjibhai Govindbhai Limbachia, PW 6, Exh.20, to prove its case. The prosecution also produced documentary evidence such as panchnama of search of person of the appellant prepared in presence of panch witnesses, the First Information Report lodged by P.S.I. Mr. Yadav, report received from Forensic Science Laboratory, Ahmedabad, etc. to prove the charge against the appellant. After recording of evidence of prosecution witnesses was over, the learned Judge questioned the appellant generally on the case and recorded his statement under Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the appellant stated that the case of the prosecution was false, but he did not lead any evidence in his defence.

4. On appreciation of evidence led by the prosecution, the trial Court held that it was proved by the prosecution that the appellant was found in possession of charas on March 18, 1988 without any pass or permit. In view of this conclusion, the learned Judge convicted the appellant under Section 8 and 20 (b) (ii) of the Act and imposed sentence to which reference is made earlier, by the impugned judgment giving rise to the present appeal.

5. Mr. P.M.Vyas, learned counsel for the appellant has taken us through the entire evidence on record. It was pleaded that as the panch witnesses have not supported the prosecution case, benefit of doubt should be given to the appellant more particularly when mandatory provisions of the Act are not complied with by the complainant. Learned counsel for the appellant emphasized that in view of inherent improbabilities

appearing in the evidence of police officials, the evidence of police officials should not be accepted without independent corroboration and as there is no independent corroboration to the evidence of police officials, the appeal should be allowed.

6. Mr. K.P.Raval, learned A.P.P. argued that the evidence of P.S.I. Mr. Yadav which is corroborated by other police officials unerringly establishes that the appellant was found in possession of charas on March 18, 1988, without pass or permit, and, therefore, the conviction of the appellant should be upheld by the Court. What was claimed on behalf of the State was that it is settled law that evidence of police officials can be accepted and acted upon by the Court without corroboration and as case of the prosecution is proved beyond reasonable doubt by trustworthy evidence of police officials, the appeal should be dismissed.

7. In view of the rival submissions advanced at the bar, the question which requires to be determined is whether the prosecution has proved the fact that the appellant was found in possession of charas on March 11, 1988, without pass or permit ? In order to prove its case, the prosecution has examined panch witness Ishwarbhai Dahyabhai Raval as prosecution witness No.1 at Exh.7. The witness stated in his deposition that on March 18, 1988, he was summoned in the Chok of Mathuriya Society at about 12-00 noon and asked to sign a paper. He deposed that he was not knowing anything about the incident. He specifically asserted before the Court that no person had passed nearby the place where he was summoned nor charas was recovered from the possession of anyone in his presence. However, he stated that mark 6/2 which was panchnama was signed by him. As the witness did not support the prosecution case, permission of the Court was sought to treat him as hostile witness and after obtaining necessary permission, he was cross-examined by the learned Addl. Public Prosecutor. In cross-examination, the witness was confronted with his earlier police statement, but he stuck to his case that in his presence charas was not recovered from anyone. As panch No.1 did not support the prosecution case, the prosecution examined another panch namely Bhikhaji Tasaji as prosecution witness No.2 at Exh.9. This witness stated that he was summoned near Mathuriya Society on March 18, 1988 at 12-00 noon where two police officials were present and at their instance, he had signed a paper. He specifically asserted that nothing objectionable was recovered from the appellant nor panchnama was prepared in his presence. He also

identified his signature on the panchnama. This witness was also permitted to be cross-examined by the Court and confronted with his earlier police statement, but the witness denied suggestions which were put to him by the learned Addl. Public Prosecutor. P.S.I. Mr. Yadav who had lodged the complaint is examined as prosecution witness No.3 at Exh.10. His evidence would show that on information being received, he had summoned panch witnesses and a watch was arranged near public water tank. According to him, after some time, the raiding party had spotted a man whose description was given while giving information, and, therefore, he was asked to stop, but the said man did not stop and started running, as a result of which he was chased and that man was arrested when he accidentally fell in the pit dug near public water tank. According to police officer, the appellant was person who was arrested and he had sustained injuries on his hand, leg and back. The witness has informed the Court that on search being made, a plastic bag containing black substance was recovered from one of the pockets of the pant put on by the appellant and as it was smelling like charas, Police Constable Jayantibhai was asked to bring weighing scales from Police Station. According to this witness on weighing scales being brought, the substance was weighed and it was found that the weight of the substance was 10 grams. The witness has asserted that the person from whose possession charas was found was appellant and on demand, the appellant could not produce any pass or permit authorizing him to possess charas. While narrating the procedure of sealing the offending substance, the witness has stated that the substance was placed in a plastic bag in which slips bearing signatures of panch witnesses were also placed, and, thereafter, the plastic bag was placed in a cover which was tied with a twine and on which seal of the Police Inspector, Kalol Police Station was affixed. The witness claimed that he had filed the complaint at Kalol Police Station against the appellant which was investigated by Police Sub-Inspector, Limbachia. In his cross-examination the witness denied the suggestion of the defence that no charas was found from the possession of the appellant on March 18, 1988. The witness also denied the suggestion of the learned counsel for the defence that a false case was registered against the appellant. It is not necessary for us to reproduced the evidence of Police Jamadar Parsottamdas Somchand and P.S.O. Sendhabhai Manjibhai in detail, but suffice it to say that the other police officials have corroborated the evidence of Police Sub Inspector Mr. Yadav. This in short is summary of evidence led by prosecution. In the light of the evidence on record, the question posed

earlier will have to be considered. There is no manner of doubt that the panch witnesses have not supported the prosecution case. However, that does not mean that the testimony of the police officials should be rejected outright. The testimony of the police officials should be treated in the same manner as the testimony of any other witnesses and the view that their testimony without corroboration by independent witness is unworthy of belief cannot be accepted. The evidence of Police Officer cannot be underestimated merely because he is a Police Officer. The evidence of Police Officer cannot be rejected merely because he is a member of police force in the absence of evidence of malice against accused. The presumption that a person acts honestly applies as much in favour of a Police Officer as in favour of other persons and it is not a judicial approach to distrust and suspect the evidence of a Police Officer without good grounds. The testimony of a witness should be judged on its own merits and the Court would not be justified in drawing an adverse inference against the witness on the ground that the witness is a Government Servant or in the employment of the police. However, it is a rule of practice that when a case hinges on the testimony of the police officials alone, it should not be ordinarily accepted without a very careful scrutiny. If the testimony of the police official is found to be improbable, untrustworthy, the Court may in a proper case refuse to place reliance on the evidence of police officials unless corroborated by independent evidence. In the light of this well settled principles, the point whether testimony of police officials should be accepted or not will have to be decided. From the evidence of P.S.I. Mr. Yadav, it is evident that while patrolling an information was received that a man wearing white pant and white shirt with black hair was to come from direction of public water tank with charas. Admittedly, this information is not reduced into writing though so required by Section 42 (1) of the Act. Sub Section 2 of Section 42 provides that where a officer takes down any information in writing under Section 42 sub Section (1), he shall forthwith sent a copy thereof to his immediate superior official. As the information received by Mr. Yadav was not taken down in writing, there is no question of sending a copy thereof by him to his immediate superior officer. Meaning thereby breach of the provisions of Section 42 (2) of the Act is also committed by P.S.I. Mr. Yadav. Having regard to the evidence led by prosecution, it becomes evident that the appellant was searched by Mr. Yadav under the provisions of Section 42 of the Act and as P.S.I. Mr. Yadav is not a gazetted officer, it was his duty to inform the appellant that

appellant had a right to be searched in presence of either a gazetted officer or a Magistrate. If the person to be searched so requires, then officer duly authorized under Section 42 of the Act is bound to take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. This is the mandate of Section 50 of the Act. The evidence of P.S.I. Mr. Yadav does not show that he had informed the appellant about his right to be searched in presence of a gazetted officer or Magistrate. Under the circumstances, there is no manner of doubt that P.S.I. Mr. Yadav did not comply with the mandatory requirement of Section 50 of the Act. The evidence of Sendhabhai Manjibhai indicates that the mudamal was handed over to Crime Writer for being forwarded to the Forensic Science Laboratory. It is relevant to note that Crime Writer to whom the mudamal was handed over for being sent to Forensic Science Laboratory is not examined by the prosecution. Thus, foolproof evidence is not led by the prosecution to establish that mudamal was kept in safe custody and there was not possibility of tampering the same. Again there is discrepancy regarding manner in which the mudamal was sealed. According to P.S.I. Mr. Yadav, the offending substance was first of all placed in a plastic bag with slips bearing signatures of panch witnesses and the plastic bag was placed in a paper cover on which seal of the Police Inspector, Kalol Police Station was affixed, whereas there is no reference in the Panchnama that the plastic bag was placed in a paper cover and the paper cover was sealed. The contemporaneous record maintained by the complainant falsifies his claim before the Court regarding manner in which offending substance was sealed after its seizure. The report of the F.S.L. would show that on opening the paper cover, slips bearing signatures of panch witnesses were found. It is nobody's case that slips bearing signatures of the panch witnesses were placed in the paper cover. This would indicate that the evidence of P.S.I. Mr. Yadav is not trustworthy or that the sample was not properly sealed, as a result of which the slips bearing signatures of panch witnesses which were placed in plastic bag had slipped out. Even the method of sealing the sample does not appear to be proper. The plastic bag in which the offending substance was placed should have been sealed in order to rule out possibility of tempering, but the evidence does not indicate that the plastic bag in which the substance was placed was sealed at any point of time. All the police officials claimed in their evidence that the appellant had sustained injuries when he attempted to run away on seeing police officials. Surprisingly, the appellant was

never referred to any Hospital for treatment. The explanation given by the police officials that the appellant was not taken to hospital as he was not inclined to be treated does not appear to be probable. No evidence is led by the prosecution to show that in the process of running away, the appellant had sustained injuries on his hand, leg and back. In view of inherent improbabilities appearing in the evidence of police officials, we are of the opinion that on the facts and in the circumstances of the case, their evidence cannot be accepted without corroboration by independent evidence. As noted earlier, the panch witnesses have not supported the prosecution case. Panch witness Ishwarbhai Raval denied the suggestion made by the learned Addl. Public Prosecutor that he was deposing falsely before the Court as appellant was his neighbor. Similarly, another panch witness Bhikhaji Tasaji also denied the suggestion made by the prosecution that he was deposing falsely before the Court as the appellant belongs to his caste. Nothing has been produced by the prosecution to show that the panch witnesses were won over by the appellant. On overall view of the evidence on record, we are of the opinion that prosecution has not led satisfactory evidence to prove that the appellant was found in possession of 10 grams of charas on March 18, 1988 without pass or permit and had committed offence punishable under Sections 8 and 20 (b)(ii) of the Act. Having regard to the unsatisfactory evidence led by the prosecution to prove the case, we are of the opinion that benefit of doubt deserves to be given to the appellant and the appeal deserves to be allowed.

8. For the foregoing reasons, the appeal succeeds. The judgment and order dated August 9, 1989, rendered by the learned Additional Sessions Judge, Mehsana, in Sessions Case No.110 of 1988, by which the appellant is convicted under Section 8 and 20 (b) (ii) of the Narcotic Drugs and Psychotropic Substance Act, 1985 and sentenced to R.I. for 10 years as well as fine of Rs.1,00,000/= (Rupees One Lac), in default S.I. for 1 year are hereby quashed and set aside. The respondent is directed to set the appellant at liberty forthwith unless needed with regard to any other case. Mudamal is ordered to be disposed of in terms of direction given by the learned Judge in the impugned judgment.

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Mithabhai.